Lawrence bin Masuni @ Fairus bin Abdullah & Anor v Public Prosecutor

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–80 AND 80(A) OF 2010 (Q)

ARIFIN ZAKARIA CHIEF JUSTICE, RICHARD MALANJUM CJ (SABAH AND SARAWAK), ABDULL HAMID EMBONG, AHMAD MAAROP AND ZAINUN ALI FCJJ

2 MAY 2013

Criminal Procedure — Accomplice — Whether witness an accomplice — Appellants charged with offence of murder punishable under s 302 of the Penal Code read together with s 34 of same Code — Whether Court of Appeal judges erred in fact and in law in ruling witness was not accomplice — Whether witness's evidence require corroboration — Whether witness mere presence at crime scene could be said as 'encouragement' — Whether death of deceased caused by appellants only — Whether witness an accessory after the fact

Evidence — Accomplice — Corroboration — Appellants charged with offence of murder punishable under s 302 of the Penal Code read together with s 34 of same Code — Court relied on evidence of a witness — Whether witness accomplice — Whether witness's evidence require corroboration — Whether Court of Appeal judges erred in fact and in law in failing to consider non-corroboration of witness's evidence

Both the appellants were charged with the murder of one Willy Tuoh Ching Chai ('the deceased'), an offence punishable under s 302 of the Penal Code ('the Code'), read together with s 34 of the same Code. The High Court found the appellants guilty and sentenced them to death. On appeal, the Court of Appeal affirmed the decision of the High Court, hence the present appeals. The grounds of appeal as submitted by the appellants were: (a) that the learned Court of Appeal judges erred in fact and in law in ruling that PW14 was not an accomplice; and (b) that the learned Court of Appeal judges erred in fact and in law in failing to consider the non-corroboration of PW14's evidence. In the present appeal, the appellants prayed that their conviction and sentence be set aside or alternatively that their conviction be substituted with a lesser offence and sentence. The appellants' contention that PW14 was an accomplice was based primarily on the facts that: PW14 had accompanied them to the scene of the crime with prior knowledge that a crime might have been committed by the first appellant; it was PW14 who then swung the wooden planks which killed the deceased; PW14 failed to report to the police about the said offence; even if he did not swing the fatal blow on the deceased, he did nothing to prevent the

persons inflicting the blows; and PW14 shared in the benefit of their crime. A

Held, dismissing the appellants' appeal and affirming the conviction and sentence imposed on both the appellants:

(1) In the present appeal, there was no evidence that there was any agreement between the first and second appellants and PW14 to commit the crime in 'finishing off' the deceased when all three of them went to the cul-de-sac opposite Jalan Kaka Kg Dato Baru where the deceased had fallen. Thus, in the absence of such agreement, PW14's mere presence at the scene of the crime could not be said to be an 'encouragement' (see paras 75–76). B C

(2) The contents of the cautioned statement P64 in no way implicated PW14 in the hatching of the idea to 'finish off' the deceased, or in the actual infliction of further injuries on him. In fact, P64 made no mention whatsoever of PW14. The inculpatory part of P64 related to the admission by the first appellant that the second appellant hit the deceased with a plank, which in itself was a confession that the offence involved only the two appellants. The only inference could only be that the deceased's death was caused by the acts of the first and second appellants and not by PW14, as was correctly held by the learned trial judge (see paras 77–79 & 81). D E

(3) PW14 had no prior knowledge of the crime to be committed. He was no doubt present at the scene, but there was no overt act by him in the commission of the offence. He was a passive witness. In any event, even if PW14 was an accessory after the fact (which was not the case in the instant appeal), 'strictly speaking, an accessory after the fact cannot be an accomplice as he is not concerned in the commission of the original offence' (per Augustine Paul JCA) as quoted in *Nomezam Apandy Abu Hassan v Public Prosecutor* [2010] 1 MLJU 2180. In any case, failure to report to the police about the offence charged was insufficient ground to make PW14 an accomplice. Moreover, the learned trial judge made a finding that PW14 was a credible witness, whose testimony was firm and unshakeable even in the face of rigorous cross-examination. The Federal Court as an appellate court should be slow in interfering with such finding (see paras 86 & 89–92). F G H

(4) The court agreed with the learned trial judge that having considered the evidence in its entirety including the statements from the dock of the appellants, the prosecution had succeeded in proving its case against the appellants beyond all reasonable doubt. The court therefore agreed with the learned trial judge's finding that PW14 was not an accomplice nor was he an accessory after the fact and therefore his evidence was to be regarded as that of an ordinary witness requiring no corroboration (see paras 102 & 112). I

A **[Bahasa Malaysia summary**

Kedua-dua perayu dituduh atas kesalahan membunuh Willy Tuoh Ching Chai ('si mati'), suatu kesalahan yang boleh dihukum di bawah s 302 Kanun Keseksaan ('Kanun'), dibaca bersama dengan s 34 Kanun yang sama. Mahkamah Tinggi mendapati perayu-perayu bersalah dan menjatuhkan hukuman mati ke atas mereka. Di atas rayuan, Mahkamah Rayuan telah mengesahkan keputusan Mahkamah Tinggi, maka rayuan semasa telah difailkan. Alasan rayuan seperti yang dikemukakan oleh perayu adalah: (a) bahawa hakim Mahkamah Rayuan yang bijaksana telah terkhilaf dari segi fakta dan undang-undang dalam memutuskan bahawa PW14 bukan rakan sejenayah; dan (b) bahawa Hakim Mahkamah Rayuan yang bijaksana terkhilaf dari segi fakta dan undang-undang apabila gagal untuk mempertimbangkan ketiadaan sokongan bagi keterangan PW14. Dalam rayuan semasa, perayu-perayu memohon agar sabitan dan hukuman mereka diketepikan atau secara alternatifnya bahawa sabitan mereka diganti dengan kesalahan dan hukuman yang lebih rendah. Hujahan perayu bahawa PW14 adalah rakan sejenayah adalah berdasarkan fakta-fakta bahawa: PW14 telah menemani mereka ke tempat kejadian dengan pengetahuan awal bahawa jenayah mungkin telah dilakukan oleh perayu pertama; PW14 yang kemudiannya menghayun kayu yang membunuh si mati; PW14 gagal melaporkan kepada polis tentang kesalahan tersebut; walaupun PW14 tidak menghayunkan pukulan maut pada si mati, dia tidak melakukan apa-apa untuk menghalang orang yang membuat pukulan tersebut; dan PW14 mendapat manfaat daripada jenayah yang dilakukan bersama.

Diputuskan, menolak rayuan perayu-perayu dan mengesahkan sabitan dan hukuman yang dikenakan ke atas kedua-dua perayu:

(1) Dalam rayuan semasa, tidak ada keterangan bahawa terdapat apa-apa perjanjian antara perayu pertama dan kedua dan PW14 untuk melakukan jenayah dalam 'menamatkan' si mati apabila ketiga-tiga mereka pergi ke cul-de-sac bertentangan Jalan Kaka Kg Dato Baru di mana si mati telah jatuh. Oleh itu, tanpa adanya perjanjian tersebut, kehadiran PW14 di tempat kejadian tidak boleh dikatakan sebagai 'dorongan' (lihat perenggan 75–76).

(2) Kandungan pernyataan beramaran P64 tidak dalam apa-apa cara sekalipun mengaitkan PW14 dengan idea untuk 'menamatkan' si mati, atau dalam mengakibatkan kecederaan lanjut yang sebenar ke atas si mati. Malah, P64 tidak menyebut apa-apa tentang PW14. Bahagian yang menuduh di dalam P64 adalah berkaitan dengan pengakuan oleh perayu pertama bahawa perayu kedua memukul si mati dengan papan, yang dengan sendirinya adalah pengakuan bahawa kesalahan itu hanya melibatkan kedua-dua perayu. Satu-satunya inferens yang boleh dibuat adalah bahawa kematian si mati adalah disebabkan oleh tindakan perayu

pertama dan kedua dan bukan oleh PW14, sepertimana yang diputuskan dengan tepat oleh hakim bicara yang bijaksana (lihat perenggan 77–79 & 81).

(3) PW14 tidak mempunyai pengetahuan awal tentang jenayah yang akan dilakukan. Adalah tidak diragui bahawa dia hadir di tempat kejadian, namun tiada tindakan terbuka olehnya dalam melakukan kesalahan itu. Dia adalah saksi pasif. Jika pun PW14 adalah aksesori selepas fakta (bukan dalam rayuan semasa), 'strictly speaking, an accessory after the fact cannot be an accomplice as he is not concerned in the commission of the original offence' (Augustine Paul JCA) seperti yang disebutkan di dalam kes *Nomezam Apandy Abu Hassan v Public Prosecutor* [2010] 1 MLJU 2180. Dalam hal apapun, kegagalan untuk melaporkan kepada polis tentang kesalahan yang dituduh adalah alasan yang tidak mencukupi untuk menjadikan PW14 sebagai seorang rakan sejenayah. Selain itu, hakim bicara yang bijaksana telah membuat keputusan bahawa PW14 adalah saksi yang boleh dipercayai, yang keterangannya kukuh dan tidak tergugat walaupun menghadapi pemeriksaan balas yang bertubi-tubi. Mahkamah Persekutuan sebagai mahkamah rayuan harus lebih perlahan dalam mengganggu keputusan tersebut (lihat perenggan 86 & 89–92).

(4) Mahkamah bersetuju dengan hakim bicara yang bijaksana bahawa setelah mempertimbangkan semua bukti termasuk penyataan dari kandang saksi perayu-perayu, pihak pendakwaan telah berjaya membuktikan kesnya terhadap perayu melampaui semua keraguan munasabah. Oleh itu, mahkamah bersetuju dengan keputusan hakim bicara yang bijaksana bahawa PW14 bukanlah seorang rakan sejenayah ataupun aksesori selepas fakta dan oleh itu keterangannya patut dianggap sebagai keterangan daripada saksi biasa yang tidak memerlukan keterangan sokongan (lihat perenggan 102 & 112).]

Notes

For cases on corroboration, see 7(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 6–37.

For cases on whether witness an accomplice, see 5(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 19–27.

Cases referred to

Alimuddin v R 23 C 361 (refd)

Davies v Director of Public Prosecutions [1954] AC 378, HL (refd)

Director of Public Prosecutions v Kilbourne [1973] 1 All ER 440; [1973] AC 729, HL (refd)

Francis Antonysamy v PP [2005] 3 MLJ 389, FC (refd)

Gunadhar Das And Ors v State AIR 1952 Cal 618, HC (refd)

A *Harcharan Singh & Anor v PP* [2005] 1 MLJ 593; [2005] 1 CLJ 11, CA (distd)
Jayalal Anandagoda v The Queen [1962] 1 WLR 817, PC (refd)
Kuan Ted Fatt v PP [1985] 1 MLJ 211, FC (refd)
Lemanit v PP [1965] 2 MLJ 26; [1965] 1 LNS 89, FC (refd)
B *Loo Chuan Huat v PP* [1971] 2 MLJ 167b, FC (refd)
Mohamed Salleh v PP [1969] 1 MLJ 104, FC (refd)
Muniandy & Anor v Public Prosecutor [1973] 1 MLJ 179, FC (refd)
Nomezam Apandy Abu Hassan v PP [2010] 1 MLJU 2180; [2011] 3 CLJ 868, CA (refd)
C *Periasamy s/o Sinnappan & Anor v PP* [1996] 2 MLJ 557, CA (refd)
PP v Teong Lung Chiong & Ors [2010] 5 MLJ 193, FC (refd)
PP v Sarjeet Singh & Anor [1994] 2 MLJ 290, HC (refd)
R v Baskerville [1916] 2 KB 658 (refd)
D *Ramachandran v PP* [1972] 2 MLJ 183 (refd)
Smith v Reynolds [1986] Crim LR 559 (refd)

Legislation referred to

Evidence Act 1950 ss 30, 30(1), 133

E

Appeal from: Civil Appeal No Q-05–105 of 2004(A) and (Q)-05–105 of 2004 (Court of Appeal, Putrajaya)

Ali Basah (Ali Basah & Partners) for the first appellant.
F *Yap Yau Sin (Wan Junaidi & Co) for the second appellant.*
Awang Armadajaya Awang Mahmud (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Zainun Ali FCJ (delivering judgment of the court):

G

[1] In an otherwise straightforward case involving a common intention to murder the deceased by the appellants, the issue which arose and which formed the ground of their joint appeals was whether one Jormie Ryan bin Joe Menawan (PW14 or 'Andy') was an accomplice and that if he was whether the
H trial judge had erred in failing to consider the non-corroboration of PW14's evidence.

[2] In the High Court, both the appellants were charged with the murder of one Willy Tuoh Ching Chai (M) ('the deceased Ah Chai'), where the amended
I charge reads as follows:

> That you, in furtherance of the common intention of you all, on the *7th day of August 1998, between 1.30a.m. to 6.00a.m., at an unnamed road, off Jalan Kaka, Kampung Dato Baru, in the District of Sibu in the State of Sarawak*, committed murder by causing the death of one *WILLY TUOH CHING CHAI (M)* and thereby

committed an offence punishable under section 302 of the Penal Code, read together with section 34 of the same code.

[3] The appellants pleaded not guilty and were tried by the High Court. The learned trial judge in the High Court after evaluating the evidence adduced, found them guilty as charged and sentenced them to death.

[4] On appeal, the Court of Appeal affirmed the decision of the High Court.

[5] Aggrieved with the decision, the appellants gave their notices of appeal to this court on 18 July 2010. The grounds of appeal of the appellants can be summarised thus:

(a) that the learned Court of Appeal judges erred in fact and in law in ruling that PW14 (Jormie Ryan bin Joe Menawan) aka 'Andy' was not an accomplice; and

(b) that the learned Court of Appeal judges erred in fact and in law in failing to consider the non-corroboration of PW14's evidence.

[6] The appellants therefore prayed that their conviction and sentence be set aside or alternatively that their conviction be substituted with a lesser offence and sentence.

FACTS

[7] The background facts as can be gleaned from the records were that both the appellants were drinking liquor, talking and playing cards with about nine or ten other persons in Kampong Bandong on the evening of 6 August 1998. Earlier, Frederik bin Jiri ('PW11') and Uddin went to the first appellant's house. They were joined there by the second appellant. Then all of them came up with some money and bought liquor and drank it. Then all five of them went to Kg Bandong where they were joined by others.

[8] At about midnight, the deceased came by, riding on a motor scooter. As narrated by PW11, the first appellant approached the deceased. After chatting for about two to three minutes, the first appellant hopped on the deceased's motor scooter and they went away, returning about 30 minutes later.

[9] The pair of them (the first appellant and the deceased) then went off again on the motor scooter for the second time that night. The group then broke up and left the venue.

[10] The abovesaid event was related by both PW11 (Frederik bin Jiri) and PW13 (Eddy Syarizan bin Azman). PW14 substantially corroborated the

A evidence of PW11 and PW13. PW13 said that he then left the place. According to PW14, after the first appellant and the deceased went off together for the second time that night, he and the second appellant went to the first appellant's house, to rest and relax. However upon their arrival, they discovered that the first appellant was not home.

B

[11] It is PW14's evidence that, both he and the second appellant then waited for a while at the first appellant's house. When the first appellant finally returned home alone on the deceased's motor scooter, PW14 said that the first appellant looked distressed and told PW14 that he had beaten up the deceased.
C According to PW14, the first appellant then took him and the second appellant to the scene of the crime, which was a dead end lane, opposite Jalan Kaka Kg Dato Baru. To get there, the first appellant rode the deceased's scooter while PW14 and the second appellant rode on the latter's motorcycle with PW14
D riding pillion.

[12] Upon reaching the scene of the crime, PW14 said that he saw the deceased 'lying with his face downward, and that he was still breathing and groaning'. PW14 testified that he then saw each of the appellants taking a plank
E which was by the edge of the road, and that they both repeatedly hit the deceased's head. PW14 testified that the two planks were about three feet long and about an inch thick. PW14 said that the deceased groaned when he was hit by the appellants but that after sometime his groans stopped altogether.

F

[13] It is PW14's evidence that he could positively identify that the body lying on the road was that of the deceased. PW14 said it was possible to determine this as it was a moonlit night and there was a street light about 30 ft away from where the deceased was lying.

G

[14] PW14 testified further that after the first and second appellants took turns to hit the deceased, he saw the first appellant opening the compartment under the seat of the deceased's scooter and taking out a handbag from it.

H **[15]** PW14 also testified that he saw the second appellant taking a necklace from the deceased's neck.

[16] Subsequently all of them went back to the first appellant's house on the second appellant's motorcycle. They left the deceased's motor scooter at the
I scene.

[17] It was at the first appellant's house that the items taken from the deceased were shared between them.

[18] From the deceased's handbag, the first appellant took out cash of RM130, two gold rings, one bank card and some papers.

[19] The first appellant then threw the handbag and its content into the river behind the first appellant's house.

[20] According to PW14, the first appellant and second appellant went out to try to use the bank card. They returned shortly after that and complained that the bank card was unable to be used as it got 'stuck' in the machine.

[21] The next morning the items taken from the deceased were later distributed between the three of them. The first appellant took RM50 of the deceased's money of RM130, and the second appellant and PW14 took RM40 each.

[22] PW14 said that the first appellant kept the deceased's two gold rings and necklace.

[23] In court, PW14 identified the relevant exhibits ie, the photographs of the deceased (P5E), the deceased's motor scooter (P3E), the photograph of Jalan Kampong Dato Baru and Jalan Kaka (P3A and P3B) respectively, the dead end lane (P3C), the second appellant's motorcycle (P5G) and the two planks allegedly used in the crime (ED 17A) and (IDI 18A), the gold rings and the necklace (contents of ID 14).

[24] As regards the injuries inflicted on the deceased, Dr Myint Soe the pathologist ('PW3') conducted the post-mortem and prepared the report, and identified three serious wounds ie, 5 x 1 x 1 cm wound in the deceased's lower jaw with a fracture of the jaw bone; four lacerated wounds the largest being 10 x 2 x 1 on the back right side of the head with a fracture of the skull and two lacerated wounds, the largest being 3 x 2 x 1 cm on the back left side of the head with fracture of the skull.

[25] The cause of death according to PW3 is severe head injuries, in which the four lacerated wounds on the back right side of the head with a fracture of the skull and two lacerated wounds on the back left side of the head with a fracture of the skull, were the probable cause of death.

[26] The learned trial judge ordered both the appellants to enter their defence, on being satisfied that a prima facie case had been established by the prosecution.

A **[27]** Both the appellants upon being called to enter their respective defence, elected to give unsworn statements from the dock. Although it is their right to do so, their statements being unsworn, must be less than their being evidence given from the witness box (see *Mohamed Salleh v Public Prosecutor* [1969] 1 MLJ 104).

B

THE FIRST APPELLANT'S DEFENCE

[28] The first appellant in his unsworn statement denied culpability to the charge. He denied that he was the one who assaulted the deceased with the C plank which caused his death. The first appellant admitted that he had beaten the deceased but that it was done to thwart the latter's sexual advances on him. In putting across his version, the first appellant stated that he became increasingly angry when the deceased persisted with his amorous overtures. He said that he punched the deceased on the face because of the deceased's D persistence and the deceased's refusal to respond to the first appellant's request to go home. The first appellant said that the deceased doggedly insisted on lingering there for a while. All this added up to the first appellant's anger towards the deceased.

E

[29] In defending his version of events, the crucial part of the first appellant's unsworn statement reads as follows:

> After I punched him on his face Ah Chai (the deceased) fell down to the ground on the tarred road. He got up and tried to fight back. He pulled at my shirt and tried F to fight me. I pushed him away. I noticed a piece of wood nearby. He tried to fight with me, then I did not notice whether I hit him front or back. I just hit him. After hitting Ah Chai once or twice Ah Chai fell to the ground again. I hit Ah Chai again with a piece of wood I had used earlier at his back. After hitting him on his back I felt nervous. Then I started the engine of the scooter and went to look for my friend.

G

[30] From the material before this court, it could be seen that after his altercation with the deceased the first appellant then went home, where he met the second appellant and PW14 who were waiting for him. After telling PW14 H that he had quarrelled with the deceased and that he had hit him, he asked them what he should do. The first appellant then took the second appellant and PW14 to the scene where the deceased had fallen after being beaten by him. All of them took a closer look at the deceased and found the deceased groaning in pain and nursing his head with his hands.

I

[31] At this point in his testimony, the first appellant's story took a different turn. The first appellant said that he then went over to the deceased's scooter where a while later, he not only heard the sound of hitting but that, he also heard the second appellant asking PW14 why PW14 was hitting the deceased.

The first appellant said that he turned around and saw PW14 holding a piece of wood. The first appellant said that he then snatched the piece of wood from PW14 and tossed it aside.

THE SECOND APPELLANT'S DEFENCE

[32] The second appellant in his unsworn statement confirmed accompanying the first appellant and PW14 to the scene where the deceased lay injured. The second appellant said that when the first appellant went to the deceased's scooter, PW14 picked up a piece of wood and hit the deceased two or three times. He said he shoved PW14 away from the deceased and asked him why he was hitting him (the deceased).

[33] According to the second appellant, the first appellant then snatched the piece of wood from PW14 and threw it away before going back to the scooter.

[34] The second appellant said that when he asked PW14 why he hit the deceased, PW14's reply was that since the deceased knew him (PW14), and knew where he lived, the deceased would cause trouble to him (PW14). The second appellant said that PW14 then assured him that nothing adverse will happen to them in view of what had taken place. The second appellant said that PW14 then asked him to take the gold chain from the deceased's neck before going home.

[35] As is clear, each party had their own versions of the event. But the learned trial judge after evaluating all the evidence adduced, found that the prosecution had proven its case beyond reasonable doubt against the first and second appellants.

The learned trial judge found both the appellants guilty of the charge against them and convicted them accordingly and passed the sentence of death. On appeal, the Court of Appeal unanimously held that the learned trial judge had not misdirected himself in arriving at his decision and affirmed the conviction and sentence against the appellants.

[36] In the appeal before this court, it would be helpful to briefly outline the findings made by the learned trial judge.

FINDING OF THE TRIAL JUDGE

[37] In the High Court the learned trial judge in finding that the prosecution had proved its case beyond a reasonable doubt also found that there was common intention beyond reasonable doubt of both the appellants to commit murder of the deceased. The learned trial judge also found no contradictions at

all in the first appellant's cautioned statement (P64), and that the second appellant's explanation in his cautioned statement (P67) was not consistent with his innocence.

[38] The trial judge found that the nature of the wounds inflicted as indicated from the evidence of PW14 and the evidence of the first appellant himself in P64, was such that when inflicted the blows must have been intended to kill the person on whom they were inflicted.

[39] In finding the contents of P64 to be a confession which can be used against the first appellant, the trial judge also held that it could also be used to implicate the second appellant.

[40] As an adjunct, can the first appellant's cautioned statement (P64) implicate a co-accused?

The learned trial judge took the position that the first appellant's cautioned statement is a confession in reference to its own intrinsic terms. As Lord Guest observed, inter alia, in *Jayalal Anandagoda v The Queen* [1962] 1 WLR 817:

> ... But equally it is irrelevant to consider when the accused intended to make a confession. If the facts in the statement added together suggest the inference that the accused is guilty of the offence then it is nonetheless a confession even though the accused at the same time protests his innocence.

[41] In this regard, the case of *Gunadhar Das And Ors v State* AIR 1952 Cal 618 is instructive. Trevor Harries CJ observed, inter alia, that:

> ... the correct direction appears to me that the confession may be used to corroborate the other evidence. In short, the conviction must be based on the other evidence. The confession can only be used to help to satisfy a court that the other evidence is true.

[42] Thus s 30 of the Evidence Act 1950 properly applies so that the confession may be taken into consideration as against other persons jointly tried for the same offence which are affected thereby (see *Public Prosecutor v Teong Lung Chiong & Ors* [2010] 5 MLJ 193).

[43] The trial judge in accepting the evidence of PW14 found that the contention of the appellants that the former was an accomplice was untenable, in view of the facts adduced and surrounding circumstances.

[44] Since the thrust of this appeal is only concerned with the narrow issue of whether PW14 was an accomplice and that the court had failed to consider the non-corroboration of PW14's evidence, it suffice to say that the Court of Appeal agreed with the learned trial judge that there was nothing in the

evidence and in P64 which point towards PW14's intention to participate or actually participating in the infliction of any of the injuries sustained by the deceased.

[45] In fact the Court of Appeal accepted the learned trial judge's finding that PW14's evidence was not inherently incredible as to be accepted.

[46] As a corollary, the Court of Appeal also accepted the trial judge's finding that on the issue of common intention, P64 did not implicate PW14 in the planning of the idea to 'finish the deceased off' and that neither was PW14 involved in the actual infliction of further injuries on the deceased; that it was the acts of the first and second appellants themselves which indicates common intention on their part to snuff the life out of the deceased.

[47] Now, the issue raised before this court is simply whether PW14 is an accomplice and the court had failed to consider the non-corroboration of his evidence. Counsel for both appellants had submitted that the trial judge and the Court of Appeal judges erred in fact and in law in ruling that PW14 was not an accomplice and that the courts below failed to consider the non-corroboration of PW14's evidence. It was the first appellant's submission that there were conflicting evidence as to who delivered the fatal blow(s) on the deceased since all three of them were present at the scene. According to the first appellant each of them (the first and second appellants) gave their own versions of the event as to who dealt the fatal blow. The first appellant argued that since the second appellant had implicated PW14, the latter should have been charged together with them (the first and second accuseds).

[48] It was also the contention of the first appellant that given the fact that PW14 had been implicated, the learned trial judge ought to have scrutinised the testimonies of both PW17 (ASP Peter ak Embuas) the investigating officer of the case and PW18 (Chief Insp Mohd Shahar bin Md Yunus). This was especially crucial since PW17 hardly testified regarding the investigation that he and his assistant PW18 had done in respect of PW14.

[49] The first appellant's further submission is that since PW14 was a witness to the final moments of the attack on the deceased, a thorough investigation should have been made on PW14.

[50] The first appellant said that even if the lower courts did not believe the second appellant's version of events (that PW14 delivered the final blow), firstly the fact remained that in witnessing the deceased's final moments, PW14 did not prevent or attempt to stop either of the appellants from delivering the blows on the deceased. Secondly, PW14 received part of the deceased's money

A and thirdly, PW14 did not inform anyone of what he had seen or known of the offence purportedly committed by the appellants against the deceased.

[51] Based on the above facts, both the first and second appellants contended that PW14 was therefore at the very least, an accessory after the fact and that his evidence must be considered on the same principles as that of an accomplice since the role he played was not passive (*Harcharan Singh & Anor v Public Prosecutor* [2005] 1 MLJ 593; [2005] 1 CLJ 11).

[52] To compound the problem, it is the contention of both the appellants that in view of the evidence, the learned trial judge ought to have been cognisant of the fact that the police did not carry out fingerprint tests on the murder weapons ie, the pieces of wood used to inflict the fatal injuries on the deceased.

[53] The first appellant emphasised that PW14 was a witness to the final moments of the attack on the deceased. Yet if his story was true, he did nothing to prevent the appellants from delivering the blows on the deceased which happened before his very eyes.

[54] The first appellant went so far as to contend that even if the Court of Appeal had made the alternative finding as stated above, there is nothing in the appeal record which tends to corroborate PW14's evidence. This is because the first appellant's cautioned statement (P64) does not incriminate the first appellant. The first appellant argued that his words 'Saya bertanya kepada Noorha (second appellant) macam mana ni', could not be taken to mean that the first appellant had encouraged or abetted in making the fatal blow, as it merely manifested a statement of a person who was in panic. The first appellant contended that if indeed he had intended to kill the deceased, he could have done the deed earlier ie, before bringing the second appellant and PW14 on the scene. Thus the first appellant argued that his cautioned statement (P64) does not come within the purview of s 30(1) of the Evidence Act 1950 (see *Harcharan Singh & Anor v Public Prosecutor* [2005] 1 MLJ 593; [2005] 1 CLJ 11).

[55] The prosecution's case on the question of whether PW14 is an accomplice is that PW14 was not an accomplice based on the findings made by the learned trial judge, and that he was merely a bystander.

[56] The prosecution agreed with the findings made by the learned trial judge that based on the evidence, PW14 merely followed the appellants to the scene of the crime. That although PW14 witnessed the crime, he did not participate nor inflicted any injury on the deceased.

[57] The learned trial judge found that the potentially incriminating reply made by PW14 during cross-examination (ie, when PW14 said 'I agree', to the question that he agreed to testify to avoid criminal proceedings against him) was neutralised in PW14's answer during re-examination.

[58] The prosecution agreed with the trial judge that there appeared to be nothing in the evidence including those elicited during cross-examination to indicate that PW14 had taken part or even intended to participate in the common intention of the first and second appellants in inflicting injuries on the deceased leading to his death.

[59] In fact the prosecution's case is that the evidence led by PW11 was substantially similar to the evidence of PW14 and thus the former's evidence had substantially corroborated the evidence of the latter (PW14).

[60] The prosecution agreed with the learned trial judge that the suggestions made by the appellants that it was PW14 who suggested that the 'appellants should hit the deceased and finished him off' had no basis, based on the evidence. It is clear from the cautioned statement found in P64 (which the first appellant made to ASP Tan Boon Sing (PW16) on 10 August 1998 ie, about three days after the incident) that there was no such suggestion made by PW14.

[61] The prosecution quoted the judgment of the learned High Court judge in extenso which tended to indicate that although PW14 was present at the scene of the crime and witnessed the assault on the deceased by the appellants, his non-participation in the deed was reflective of his state of mind, in that there was no common intention on the part of the appellants and PW14 in furtherance of the crime committed.

[62] On the question of whether there was corroboration to PW14's evidence, the prosecution contended that there was a surfeit of evidence to corroborate that of PW14's.

[63] However it is the learned deputy public prosecutor's contention that in the first place PW14 was not an accomplice, and that even if this court finds otherwise and that the need for corroboration arises, the two conditions ie: (a) that his evidence was capable of belief; and (b) that it was independent, had been satisfactorily fulfilled.

DECISION

[64] The issue before this court is simply this — whether PW14 was an accomplice and if so, whether the court below had failed to consider the non-corroboration of his evidence.

[65] In contending otherwise, the burden on the prosecution that he was not, is one of beyond reasonable doubt.

IS PW14 AN ACCOMPLICE?

[66] Although authorities abound, the issue of whether a particular witness is or is not an accomplice can be fraught with difficulties, given the endless variety the term represents.

[67] The word 'accomplice' has its roots in common law, where its Latin equivalent, that of 'particeps criminis', gives an indication of its meaning ie, one who participates in the commission of crime.

[68] Perhaps one of the most comprehensive definitions and meaning of an accomplice is found in the case of *Francis Antonysamy v Public Prosecutor* [2005] 3 MLJ 389 where the Federal Court speaking through Augustine Paul JCA (as His Lordship then was), inter alia, asked itself:

> ... The question that arises is whether on these facts he can be termed as an accomplice. In *Davies v Director of Public Prosecutions* [1954] 1 All ER 507, it was held that persons who are *particeps crimis* in respect of the actual crime charged, whether as principals or accessories before or after the fact, are accomplice. In explaining the role played by these categories of persons the *Law of Evidence* by Woodroffe and Amir Ali (16th Ed) (Vol 4) says at p 3434–5:
>
> > A principal of the first degree is one who actually commits the crime; a principal of the second degree is a person who is present and assists in the perpetration of the crime, an accessory before the fact is one who counsels, incites, connives at, encourages or procures the commission of a crime; everyone is an accessory after the fact to a felony who, knowing a felony to have been committed by another, receives, comforts or assists him in order to enable him to escape from punishment; or rescues him from arrest for the felony, or having in custody for the felony, intentionally and voluntarily suffers him to escape; or apposes his apprehension.
>
> PW4 neither committed the crime nor did he assist the accused in committing it. Neither did he procure its commission. As he assisted the accused in concealing the crime he is clearly an accessory after the fact. In commenting on the evidentiary value of the testimony of such a witness the Court of Appeal said in *Harcharan Singh & Anor v PP* [2005] 1 MLJ 593 at pp 600–601:
>
> > There is some controversy as to whether an accessory after the fact is an accomplice in the strict sense as he is not concerned in the original offence for which the accused has been charged. As *Sarkar on Evidence* (14th Ed) (Vol 2) says at pp 1912–1913:
> >
> > > In the penal laws of this country ordinarily two classes have been recognized: Persons who are principals (ie directly or indirectly concerned in the offence) and abettors or instigators (ie privy to the offence). The

term 'accomplice' obviously includes principals in the first and second degrees as also abettors. An accessory after the fact is one who knowing a felony to have been committed receives, relieves, comforts, assists, harbours or maintains a felon. In a case it was doubted whether an accessory after the fact is an accomplice (*R v Chutterdharee* 5 WR Cr 59: see also *Nga Pauk v R* AIR 1937 R 513) but the Judicial Committee has held that he is (*Mahilikilili v R* AIR 1943 PC 4 ; 44 Cr LJ 1 *Mahadeo v R* AIR 1936 PC 242 ; 40 CWN 1164; see *Ismail v R* AIR 1947 L 220). An accessory after the fact being not concerned in the original offence for which the accused is tried, may not in the strict sense come within 'accomplice', but even in such cases there are exceptions, eg, the possessor of stolen property soon after theft may be presumed to be the thief (v. ill (a) to s 114) and he is an accomplice in the case against the thief. All accessories after the fact are not of the same degree of criminality, as so much depends on the particular facts of each case. In many cases the question whether an accessory after the fact is or is not an accomplice in law may assume an academic form, the principal point to which consideration is applied being whether corroboration of his evidence is required. Whether an accessory after the fact does or does not come technically within the category of 'accomplice', he is on the same footing as an accomplice and his evidence is no better. The presumption of untrustworthiness equally attaches to his evidence and on the same principle as that of an accomplice, the sounder rule would be to require corroboration (see *Alimuddin v R* 23 C 361 posts; *R v Kalu* AIR 1937 O 259; *Shyan Kumar v R* AIR 1941 O 130; *Brijpal v R* AIR 1936 O 413; *Turab v R* AIR 1935 O 1; *Sundor Lai v R* AIR 1934 O 315; *Nawab v R* AIR 1923 L 391; *Bahawala v R* AIR 1925 L 432; *Hayatu v R* AIR 1929 L 540; *Ismail v R* AIR 1947 L 220; *Ashutosh v S* AIR 1959 Or 159 and cases post), except when it can dispensed with in the special circumstances of a case. In such cases the real questions is the degree of credit to be attached to the evidence of these witnesses who as accessories are concerned with the accused in some other offence arising out of the original offence.

Strictly speaking an accessory after the fact cannot be an accomplice as he is not concerned in the commission of the original offence. In *Kuan Ted Fatt v Public Prosecutor* [1985] 1 MLJ 211 the Federal Court did not treat a witness who was present at the time of the commission of the offence as an accomplice as he had no prior knowledge that the offender intended to commit the offence charged. However, it can be safely stated that the question of whether an accessory after the fact is an accomplice is academic as his evidence must be considered on the same principles as that of an accomplice. Where he has played an active role his evidence must be corroborated. On the other hand if his role has been passive his evidence may be accepted with the usual corroboration warning.

On the facts of this case PW4 played a very active role in his capacity as an accessory after the fact. His evidence must therefore be corroborated.

[69] Given the varying definitions, it is clear that in looking to see whether a witness is an accomplice or otherwise, the investigation must, of necessity, include an assessment of the mens rea of not only the perpetrator of the offence, but also the person charged with aiding and abetting or encouraging the offence.

[70] Given the fact that aiding and abetting is synonymous with the concepts of giving assistance and encouragement to the principal offender, is there such consensus and a causal link of PW14 between the aiding and abetting and the commission of the completed crime by the principal offenders (the appellants) in the instant appeal? These are some of the fundamentals which have to be considered in meeting the appellants' grounds of appeal.

[71] The contention of the appellants that PW14 was an accomplice is based primarily on his accompanying them to the scene of the crime with prior knowledge that a crime may have been committed by the first appellant; that it was PW14 who then swung the wooden planks which killed the deceased; that PW14 failed to report to the police about the said offence; that even if he did not swing the fatal blow on the deceased, he did nothing to prevent the person or persons inflicting the blows; and that PW14 shared in the benefit of their crime when he got RM40 of the deceased's money.

[72] However more evidence than these would be needed to implicate PW14 as an accomplice in the commission of the crime against the deceased in this appeal. As was clearly, illustrated by Justin FA Chua in *Ramachandran v Public Prosecutor* [1972] 2 MLJ 183, quoting Lord Simonds in *Davies v Director of Public Prosecutions* [1954] AC 378 at p 400:

> ... There is in the authorities no formal definition of the term 'accomplice': and Your Lordships are forced to deduce a meaning for the word from the cases in which X, Y or Z have been held to be or held liable to be treated as, accomplices. On the cases it would appear that the following persons, if called as witnesses for the prosecution, have been treated as falling within the category:
>
> > (1) On any view, persons who are *particeps criminis* in respect of the actual crime charged, whether as principals or accessories before or after the fact (in felonies) or persons committing, procuring or aiding and abetting (in the case of misdemeanours). This is surely the natural or primary meaning of the term 'accomplice'.
>
> There must also, inter alia, according to Megan LJ in *Clarkson* [1971] 3 All ER 344, 'be an intention to encourage and there must also be encouragement in fact'. (See also: *Francis Antonysamy*).

[73] PW14's presence at the scene of the crime may come under the category of 'encouragement' in circumstances where the parties (PW14 and the appellants) have agreed that a crime be committed, even though PW14 does nothing by way of a positive act.

[74] A case in point is that of *Smith v Reynolds* [1986] Crim LR 559. In *Smith v Reynolds*, the respondent was part of a group of people in a van going to Stonehenge, United Kingdom. The van driver drove it directly at a police constable. The respondent submitted that he was not assisting or encouraging the driver to steer at the police officer. The District Court however held that the respondent could be guilty of aiding and abetting, since he was part of a group of people prepared to confront the police in their attempt to get to Stonehenge. There was an agreement that they should act in this way.

[75] But in the instant appeal, there is no evidence that there was any agreement between the first and second appellants and PW14 to commit the crime in 'finishing off' the deceased when all three of them went to the cul-de-sac opposite Jalan Kaka Kg Dato Baru where the deceased had fallen.

[76] Thus in the absence of such agreement, PW14's mere presence at the scene of the crime cannot be said to be an 'encouragement' as envisaged in authorities such as *Smith v Reynolds*.

[77] Whether there is such encouragement as to fall within the category of 'accomplice' or 'accessory' can be manifested in the surrounding circumstances. Of importance in the instant appeal, is the learned trial judge's finding that the contents of the cautioned statement P64 in no way implicates PW14 in the hatching of the idea to 'finish off' the deceased, or in the actual infliction of further injuries on him.

[78] In fact P64 makes no mention whatsoever of PW14. This is significant seeing as P64 was recorded three days after the crime was committed, when the critical details of the event were still vivid and clear in the mind of the perpetrator of the crime (ie, the first appellant).

[79] In fact the inculpatory part of the cautioned statement P64 relates to the admission by the first appellant that the second appellant hit the deceased with a plank, which in itself is a confession that the offence involves only the two appellants. It also operates as evidence against them (*Lemanit v Public Prosecutor* [1965] 2 MLJ 26; [1965] 1 LNS 89).

[80] In view of the above, the first appellant's allegation that it was PW14's idea to 'finish off' the deceased all but fell to the ground.

[81] It is undisputed that the deceased was still alive and groaning in pain when the appellants and PW14 reached the scene of the crime. It is also undisputed that the deceased stopped groaning when the appellants traded blows on his head with the wooden planks. The only inference could only be that the deceased's death was caused by the acts of the first and second appellants and not by PW14, as was correctly held by the learned trial judge.

[82] As evidence revealed, the testimony of the chemist PW3 was consistent with the evidence given by PW14 that when he arrived at the scene of the crime the deceased was found lying with his face down.

[83] In this court's view the findings of the learned trial judge is correct. The evidence of PW3 is unchallenged in that the nature of the wounds inflicted by those blows must have been intended to kill the person on whom they were inflicted.

[84] Thus the question posed in the courts below of whether there was common intention between the appellants to kill the deceased was answered by the above fact.

[85] On the question of whether not reporting the crime to the police and in sharing the loot with the appellants, PW14 is therefore considered to be an accessory after the fact, the answer to that question is this.

[86] PW14 had no prior knowledge of the crime to be committed. He was no doubt present at the scene, but there was no overt act by him in the commission of the offence. He was a passive witness. The role he played is distinguishable from that played by the so-called 'accomplice' in *Harcharan Singh & Anor v Public Prosecutor* and *Alimuddin v R* 23 C 361.

[87] Unlike the accomplice (PW9) in *Harcharan Singh & Anor v Public Prosecutor* who helped loosen the rope around the deceased's neck and not reporting the crime to anyone, and admitting that he was not charged because he agreed to testify for the prosecution, PW14's role in the instant appeal differed materially.

[88] Thus it can safely be said that the role played by the accomplice in *Harcharan Singh* and that played by PW14 are poles apart.

[89] In any event, even if PW14 was an accessory after the fact (which is not the case in the instant appeal), 'strictly speaking, an accessory after the fact cannot be an accomplice as he is not concerned in the commission of the original offence' (per Augustine Paul JCA) as quoted in *Nomezam Apandy Abu*

Hassan v Public Prosecutor [2010] 1 MLJU 2180; [2011] 3 CLJ 868.

[90] In any case, failure to report to the police about the offence charged is insufficient ground to make PW14 an accomplice (see *Kuan Ted Fatt v Public Prosecutor* [1985] 1 MLJ 211).

[91] Moreover, the learned trial judge, made a finding that PW14 was a credible witness, whose testimony was firm and unshakeable even in the face of rigorous cross-examination.

[92] This court as an appellate court should be slow in interfering with such finding (see *Periasamy s/o Sinnappan & Anor v Public Prosecutor* [1996] 2 MLJ 557).

[93] Thus the learned trial judge's finding in this appeal on this point should be accepted as true of PW14.

WAS THERE CORROBORATION?

[94] An important element in this appeal relates to the question of corroboration or lack thereof.

[95] In view of the appellants' contention that the trial judge erred in accepting the evidence of PW14 without there being independent and material corroboration and that too much weight was given to PW14's evidence and P64, it is this court's view that the facts and evidence adduced would have to be viewed in its entirety.

[96] To begin with, the question of corroboration only arises in the event that PW14 is considered an accomplice, thus necessitating the need to corroborate his evidence. However it is trite that to convict on accomplice evidence per se is not illegal as s 133 of the Evidence Act 1950 allows it. Section 133 reads:

> 133 Accomplice
>
> An accomplice shall be a competent witness against an accused person, and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

[97] As expressed by *Sarkar's Law of Evidence* (16th Ed) Reprint 2008 at p 2245:

> ... that although uncorroborated testimony of an accomplice is strictly admissible, and a conviction based on it is not illegal, yet experience teaches us that an accomplice being always an infamous person, it is extremely unsafe to rely upon his

A evidence unless it is materially corroborated, and that it is the long established and universal practice both in India and England for judges to guard their minds carefully against acting upon such evidence when uncorroborated. The rule as to corroboration has become a settled rule of practice of so universal an application that it has now assumed the force of a rule of law.

B

[98] It is also significant to add that the said corroborative evidence must also implicate the appellants (whether directly or otherwise) with the crime.

C **[99]** As illustrated in the locus classicus on corroborative evidence, ie, *R v Baskerville* [1916] 2 KB 658, it was observed, inter alia, by Lord Reid that:

> ... it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it ...

D

[100] As Lord Hailsham of St Marylebone LC made clear in *Director of Public Prosecutions v Kilbourne* [1973] 1 All ER 440; [1973] AC 729 (HL), the reason why accomplice evidence requires corroboration is the danger of a concocted story designed to throw blame on the accused. The danger is not
E less, but may be greater, in the case of fellow accomplices. Their joint evidence is not independent in the sense required by *R v Baskerville* and a jury must be warned not to treat it as corroboration. But this illustrates the danger of mistaking the shadow for the substance.

F **[101]** *R v Baskerville* has been followed by Malaysian courts in numerous cases eg, *Muniandy & Anor v Public Prosecutor* [1973] 1 MLJ 179, *Loo Chuan Huat v Public Prosecutor* [1971] 2 MLJ 167b, *Public Prosecutor v Sarjeet Singh & Anor* [1994] 2 MLJ 290 etc.

G

[102] However the question of corroboration of PW14's evidence does not arise in the instant appeal on account of PW14 being a non-accomplice. But even on the argument that he was, there is ample instances of corroborative evidence to support his testimony.

H

[103] Firstly, the evidence of PW13 and PW11 as to the sequence of events on the fateful night of 6 August 1998 corroborated that of PW14's.

I **[104]** There was of course the medical evidence of PW3, the forensic pathologist that the cause of death to the deceased was due to severe head injuries. This evidence was confirmed by PW18, the investigating officer. The injuries to the deceased as reported by both PW3 and PW18 were consistent with the testimony given by PW14.

[105] PW14's evidence was further corroborated by that of PW9's testimony. PW9 (Pau Kin Mui) operated a goldsmith shop. PW9 testified that two male Malays came to his shop at Channel Road, Sibu on 8 August 1998 at about 2.30pm to trade the items which PW14 testified were taken by the first appellant from the deceased, ie, two gold rings and a gold necklace. PW9 identified the first appellant as being one of the two said Malay men who came to his shop, thus lending credence to and corroborating the testimony of PW14.

[106] Then there is already the evidence contained in P64 and P67 which neatly put in place the details of what PW14 had testified in court.

[107] It might be mentioned that as submitted by the learned deputy public prosecutor, to constitute true corroboration, the said corroborative evidence must:

(a) be capable of belief;

(b) be independent in the sense that it cannot be corroborated by evidence which itself requires corroboration; and

(c) in respect of the fact or facts that lie at the axis of the dispute, ie, upon the fact in issue and not upon some collateral matter.

[108] It is apparent that the learned trial judge had in mind the issues relating to corroboration even if he found PW14 to be a non-accomplice.

[109] This court is of the view that the learned trial judge was entitled to believe PW14's evidence albeit when he found corroborative evidence as had been alluded to above.

[110] It is apparent from the evidence adduced that there was no consensus between the appellants and PW14.

[111] Thus having subjected PW14's evidence to careful scrutiny, this court finds no reason to depart from or interfere in the learned trial judge's finding regarding PW14's evidence since that finding is not amply supported by the evidence before him.

[112] This court agrees with the learned trial judge that having considered the evidence in its entirety including the statements from the dock of the appellants, the prosecution had succeeded in proving its case against the appellants beyond all reasonable doubt. This court consequentially agrees with the learned trial judge's finding that PW14 was not an accomplice nor was he an accessory after the fact and therefore his evidence is to be regarded as that of

A an ordinary witness requiring no corroboration (see *Nomezam Apandy Abu Hassan v Public Prosecutor*).

[113] The appellants' appeals are therefore dismissed. This court affirms the conviction and sentence imposed on both the appellants.

B

Appellants' appeal dismissed; conviction and sentence imposed on both appellants affirmed.

Reported by Dzulqarnain Ab Fatar

C

D

E

F

G

H

I